Supreme Court, U.S.
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No. 91-2001

In The

Supreme Court of the United States

October Term, 1992

RICHARD VOGEL

Petitioner,

vs.

THE CITY OF CINCINNATI

and

SCOTT JOHNSON, CITY MANAGER

and

CIVIL SERVICE COMMISSION OF THE CITY OF CINCINNATI

and

THE SENTINEL POLICE ASSOCIATION

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT THE SENTINEL POLICE ASSOCIATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Proposed by Petitioner:

1. When no hiring or promotional quota is authorized by a voluntary consent decree entered into by a political subdivision, does the Fourteenth Amendment to the United States Constitution permit that political subdivision to create a quota, which imposes a societal burden on innocent individuals, in order to meet certain goals for hiring and promoting blacks and females.

Proposed by Respondent the Sentinel Police Association:

2. Whether a nonparty to a decree has standing to impose his interpretation of the decree on the parties.

3. Whether the delay of several months in the hiring of petitioner because of his race pursuant to a consent decree, is justified by a compelling state interest to remedy discrimination under a program that is narrowly tailored to achieve that remedial purpose.

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Respondent adopts the statement of the petitioner, subject to a correction on the citation of the district court opinion. The correct cite is *Vogel v. City of Cincinnati*, No. C-1-89-683 (S.D. Oh. April 16, 1991).

JURISDICTION

Respondent adopts the statement of the petitioner.

STATUTES INVOLVED

Respondent adopts the statement of the petitioner.

I. STATEMENT OF THE CASE

A. Introduction

Richard Vogel, an individual white police officer, was delayed for several months in his original appointment as a police recruit. He claims that this short delay was a violation of his constitutional rights because it was caused by the operation of the affirmative action provisions of the consent decree in *United States v. City of Cincinnati*, No. C-1-80-369 (S.D. Oh., August 13, 1981) Consent Decree, Petitioner Appendix 31A. This case does not deserve Supreme Court review. Vogel is wrong when he suggests that there is a split among the Circuits about the rights of applicants for public employment and

wrong when he suggests that review is justified by the determination of the factual findings in this case.

B. Statement of Facts

1. History of the Consent Decree

The City of Cincinnati entered into a consent decree as a settlement of a Title VII pattern and practice suit brought by the Department of Justice on behalf of the United States in 1980. Consent Decree, Petitioner Appendix 31A. The decree was first presented to the court for approval based upon the agreement of the City of Cincinnati and the United States of America. Afterwards, the Fraternal Order of Police intervened in the case and the parties pursued further negotiations. A new decree was presented to and approved by the court effective August 13, 1981, based upon the agreement of all three parties. *Id.*

Under the decree, the City has practiced affirmative action in hiring and promotions within the Police Division. The long term goal of the decree is to:

> insure that blacks and women are not disadvantaged by the hiring, promotion, assignment and other employment policies and practices of the CPD [Cincinnati Police Division] and that any disadvantage to blacks and women which may have resulted from past discrimination is remedied so that equal employment opportunity is provided to all.

Id. at para. 2, Petitioner Appendix 33A.

The goal of the decree will be deemed to have been accomplished when, "subject to the availability of qualified applicants," the proportion "of blacks and women in all the sworn ranks of the CPD" approximates "the proportion of qualified blacks and women in the labor force for the City of Cincinnati." *Id.* Stipulations were filed with the decree that established a prima facie case of both adverse impact and intentional discrimination against blacks and women. Joint Stipulations filed June 25, 1981 (JSI), Petitioner Appendix 21A-27A; Affidavit of Government Expert Vivian B. Toler, Petitioner Appendix 28A-30A; and Joint Stipulations filed July 31, 1981 (JSII) Respondent Appendix 8A-10A.

For example, 33.7% of the applicants for entry level police officer positions were black between the years 1972 and 1979. Only 20% of the appointments, however, were black. The disparity between the expected rate of black appointments and the actual hire rate during this time was 4.7 standard deviations. JSI, para. 16-17, Petitioner Appendix 23A; Toler Affidavit, para. 7, Petitioner Appendix 29A; JSII, para. 37, Respondent Appendix 8A. Moreover, in 1980, only 9.9% of the sworn officers in the Police Division were black while the labor force in the City of Cincinnati was 24% black, JSI, para. 7 and 12, Petitioner Appendix 23A.

The stipulated facts clearly established disparate treatment against women based upon their sex:

> Prior to September of 1974, the CPD limited the opportunities of women in the sworn ranks of the CPD to 10 policewomen positions; required more education of female than male applicants for entry level positions with the CPD; did not

> provide promotional opportunities for women beyond the police specialist rank; and assigned women exclusively to the juvenile division of the CPD.

JSI, para. 18, Petitioner Appendix 23A.

In his petition, the petitioner concedes that this stipulation amounts to an admission of sex discrimination by the City. Petition for Writ of Certiorari, p.19. He then argues that no proof was introduced regarding the present effects of such discrimination in 1989. Petitioner was the party with the burden of proof, so petitioner must live with his own record.

Statistical proof also demonstrates discrimination based upon sex. The disparity between the expected number of female hires from the applicants (which were 22.8% female) and those actually employed from the 1974-75 eligibility list was 3.9 standard deviations. Toler Affidavit, para. 8, Petitioner Appendix 29A; JSII, para. 37, Respondent Appendix 8A. Only 3.4% of the sworn police force was female while the labor force of the City was 42.6% female. JSI, para. 7 and 12, Petitioner Appendix 23A.

2. Operation Of The Hiring Provisions Of The Decree

The decree establishes an interim goal of hiring 34% black and 23% women for the Police Division. That goal was set by matching the percentage of blacks and women to that present on the 1980 recruit list. Consent Decree, para. 2A, Petitioner Appendix 34A. The parties have followed a practice of granting preferences to otherwise qualified blacks and women in order to achieve these

interim goals with each recruit class. If there are insufficient qualified blacks and women, the recruit class proceeds without achieving the goal for that class. Carol Callahan deposition, Respondent Appendix 1A.

If preferences were not extended to qualified blacks and women in the hiring process, all of the candidates would be selected from a single recruit list on which they would be ranked in the order of their written test score, as adjusted for veterans points. City's response to interrogatory 19, Respondent Appendix 6A; Callahan deposition, Respondent Appendix 4A. The City conceded that the validation study done on the selection process for police recruits "doesn't include any analysis of this ranking process." Callahan deposition, Respondent Appendix 4A. Respondent Sentinel Police Association has long contended that the practice of ranking recruits by test score is not job related and has an adverse impact on blacks and women. *See United States v. City of Cincinnati*, 771 F.2d 161 (6th Cir. 1985).

3. Operation Of The Decree With Respect To Vogel

Petitioner Richard Vogel satisfied the requirements of the six parts of the selection process and was ranked no. 41 on the "majority" police recruit list with a score of 88 for exam 89-01. A score of 60 had to be achieved to pass the exam. That passing score applied to whites, blacks and women. Interrogatory Response 15, 16, 17, First Interrogatories to Defendants, Respondent Appendix 5A-65. The first class formed from the group taking exam 89-01 was sworn in on October 9, 1989 and did not include Mr. Vogel. Defendant's Response to Request for Admission

No. 1, Respondent Appendix 7A. The first class did include several blacks and women who scored lower than Mr. Vogel on the written exam. As Vogel states in his petition at page 4, n.1, he did get selected for a subsequent recruit class. Thus, as a result of the operation of the decree, Vogel's hiring was simply delayed; he was not denied employment. *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992).

C. Decisions Below

Richard Vogel brought this action under the Equal Protection Clause and 42 U.S.C. § 1981, not under Title VII. The District Court held that the goals set in the underlying decree in *United States of America v. City of Cincinnati*, No. C-1-80-369 (S.D. Oh., August 13, 1981) had not been achieved and that its application to delay the hiring of Vogel was a valid reason to supersede Ohio civil service law. Summary judgment was denied to Vogel and granted for the respondents. *Vogel v. City of Cincinnati*, No. C-1-89-683 (S.D. Oh., April 16, 1991).

The Sixth Circuit Court of Appeals affirmed. It first held that the Civil Rights Act of 1991 was not retroactive to this case which was argued before the effective date of the act. That issue was not briefed by the parties; was referenced only casually during argument; and is not raised by any of the parties with respect to this petition for certiorari. Therefore, the retroactivity of the 1991 Civil Rights Act should not be reviewed by this Court in this case. The Sixth Circuit also held that Vogel lacked standing to impose his interpretation of the decree on the

parties but had standing to challenge the constitutionality of the decree as applied to him.

On the merits of the case, the Sixth Circuit reviewed many of the facts set out above and concluded that the affirmative action hiring program adopted by the City through the decree was supported by "a strong basis in evidence" and that it was narrowly tailored to achieve the purpose of remedying the "present effects of the City's prior discriminatory hiring practices." *Vogel v. City of Cincinnati*, 959 F.2d 594, 601 (6th Cir. 1992). Vogel did not petition for rehearing *en banc* but filed his petition for certiorari in this court.

II. REASONS FOR DENYING THE WRIT

A. Twelve Recent Decisions From This Court Have Sufficiently Defined The Law On Affirmative Action

Not including school desegregation cases – this court has issued 12 major decisions, in the last fourteen years, which have affected the practice of affirmative action in employment and related areas: No new caselaw is needed in this area: See (1) *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (setting standard under Equal Protection Clause for affirmative action enrollment programs); (2) *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (affirming training program by private employer against Title VII reverse discrimination challenge); (3) *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (affirming federal statute authorizing minority set-asides); (4) *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (holding,

under Title VII, that affirmative action plan in consent decree could not be interpreted to give blacks preferences in layoffs over incumbent whites holding greater seniority rights); (5) *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that incumbent whites with greater seniority could challenge a collective bargaining agreement under the Equal Protection Clause that extended layoff preference to blacks); (6) *Local Number 93, Int'l Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (rejecting reverse discrimination challenge under Title VII to decree with race conscious promotion provisions); (7) *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (rejecting reverse discrimination challenge by union to 29% membership goal imposed by court under Title VII); (8) *United States v. Paradise*, 480 U.S. 149 (1987) (rejecting reverse discrimination challenge under Equal Protection Clause to race conscious promotion plan imposed as relief for race discrimination); (9) *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987) (rejecting Title VII challenge by male to voluntary affirmative action plan that permitted gender to be considered as a factor in promotions); (10) *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding city minority aside program to be invalid under Equal Protection Clause); (11) *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting white nonparties to consent decrees to challenge race conscious decisions under decrees); (12) *Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547 (1990) (rejecting equal protection challenge to federal statutes extending preference to minorities under radio and television licensing statutes).

B. Vogel Fails to Raise an Issue Concerning the Rights of Job Applicants

Vogel claims at pp.10-11 of his petition that there is a split in the Circuits with respect to the rights of *applicants* for public employment who are subject to the provisions of affirmative action plans. He is not correct. He claims that the decision in *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991) is somehow inconsistent on this point with the decisions of the Eighth, Seventh and Sixth Circuits in *Donaghy v City of Omaha*, 933 F.2d 1448 (8th Cir. 1991); *Billish v. City of Chicago*, No. 90-1650, No. 90-2182, 1992 U.S. App. Lexis 9262 (7th Cir. May 4, 1992); *Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990) respectively. However, the constitutional test for measuring the affirmative action program in *Peightal* was no different than that applied by the other Circuits and quite consistent with the decisions of this Court set out above. In fact, *Peightal* did not focus on the burden on white applicants. Rather, a divided court debated the adequacy of the statistical proof in that case. In general, the only time courts discuss the impact of affirmative action policies on white applicants is after the court has established that there is an adequate factual record of discrimination to permit affirmative action as a remedy. In *Peightal*, the affirmative action hiring plan was affirmed under Title VII but was remanded for further factual development under the Equal Protection theory. Vogel sued only under the Fourteenth Amendment. He did not bring his action under Title VII. Thus, the split Vogel alleges, simply does not exist.

C. Vogel Fails to Raise an Issue Based Upon the Facts

The second reason Vogel cites in support of granting the writ is that, "[T]he Sixth Circuit employed an improper methodology to determine whether there existed statistical proof of discrimination to justify race-based relief." Petition for Writ of Certiorari, p.11. This fact oriented issue does not merit review.

The Sixth Circuit carefully reviewed the relevant cases from this Court in evaluating the statistical disparities relied upon the by the City to justify affirmative action:

> Here the proper statistical comparison is between the race and gender of the Cincinnati Police Division and the race and gender of the relevant qualified labor market. *Croson*, supra, 488 U.S. at 501-02; *Wygant, supra*, 476 U.S. at 275; *Hazelwood, supra*, 433 U.S. at 308.

Vogel 959 F.2d at 600.

Then the Sixth Circuit applied the law to this case. With respect to women, the court noted the direct evidence as well as the statistical evidence of discrimination:

> In the instant case, the City's affirmative action policy with respect to women is clearly justified. In the past the City had limited women to ten positions with the CPD; required more education of female than male applicants for entry level positions with the CPD; prevented women from achieving a rank above that of police specialists; and assigned women exclusively to the juvenile division of the CPD. As of July 1980, only 3.4% of the sworn force of the Cincinnati Police Department were women while women

> constituted 22.8% of the applicants for the force during the period 1974 to February 1980.

Vogel, 959 F.2d at 600. The Sixth Circuit also carefully reviewed the race discrimination facts noting in particular the affidavit of the statistical expert, Vivian Toler, which was filed with the joint stipulations. The Court specifically held that Toler analyzed the statistics according to the "binomial approximation model adopted by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17 (1977) and *Hazelwood* [*School District v. United States*, 433 U.S. 299, 307-08 (1977)]". *Vogel*, 959 F.2d at 600. Note that this Court recently affirmed the *Hazelwood* statistical test in *Croson*, 488 U.S. at 501.

Petitioner argues that labor force data, such as that which was utilized in *Hazelwood*, may not always provide a precise mirror of those in the community who are qualified for the job. However, this Court has recognized this problem and approved of supplemental studies that focus on applicant flow. *See Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650 (1989). Therefore, to the extent that the Toler affidavit relied upon applicant flow, it was completely consistent with the rulings of this Court.

The Sixth Circuit criticized Vogel for his attack on the statistical analysis: "Vogel points to no statistics that would cast doubt on the validity of the statistics relied upon by the City." *Vogel*, 959 F.2d at 600. Vogel seeks to continue his attack in this court, but he was the plaintiff and he previously failed to meet the burden of proof.

Vogel offered no proof to challenge the extensive statistical evidence and direct evidence of discrimination embraced in the stipulations.

Finally, and most important, findings of fact simply have no place on the docket of this Court. Supreme Court Rule 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925).

D. The Writ Should Not be Granted Based Upon Vogel's Claim of Standing to Enforce His Own Interpretation of the Decree

Vogel, a nonparty to the decree, argues that the decree does not authorize the affirmative action program that the parties have used for more than a decade. The Sixth Circuit, relying on *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) held that Vogel, who was not a party to the consent decree, had no standing to enforce "his own interpretation" of the decree. *Vogel*, 959 F.2d at 598. The Court did recognize Vogel's right to challenge the constitutionality of the decree under *Martin v. Wilks*, 490 U.S. 755 (1989).

The Sixth Circuit ruling follows this court's precedent and needs no review. Moreover, this court's decision in *Martin, supra*, has been overridden by Section 108 of the Civil Rights Act of 1991 so future decisions affecting the rights of nonparties to decrees will be made in light of the legislative history of the Act. This Court should not accept a case now on an issue that is unlikely to recur.

Regardless of the Civil Rights Act, the issue of Vogel's right as a nonparty to the decree to impose his interpretation of the decree on the parties should be

permitted to "percolate" within the federal and state courts to allow a consensus to emerge. Vogel cites no caselaw that discusses this issue and apparently it has not been the subject of other rulings. See Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984).

Finally, Vogel's interpretation of the decree is simply in error. He claims that there is no basis in the decree for establishing separate lists for white males, females and blacks. But the parties stipulated to the practice in 1981 and have used it since. JSII, para. 43, Respondent Appendix 9A. In litigation over the years, the Sixth Circuit has given appropriate weight to the intent of the parties, noting that the decree, including its "preferences to black and female applicants for entry level appointments to the police force" was the result of "extensive negotiations" among the Fraternal Order of Police, the United States Department of Justice and the City of Cincinnati. *United States v. City of Cincinnati*, 771 F.2d 161, 163 (1985). This Court should not enter the debate about the meaning of the terms of this particular decree at this late date in its history.

E. The Writ Should Not be Granted Based Upon Vogel's Individual Claim of Discrimination

The Sixth Circuit correctly described the standard to be applied when an affirmative action plan is challenged under the Equal Protection Clause:

> Any racial classification must be justified by a compelling state interest [citations omitted], and

> the means chosen by the state must be narrowly tailored to achieve that goal. [citations omitted].

Vogel, 959 at F.2d at 599. The court correctly applied that standard. The court established the compelling state interest by reviewing the evidence of discrimination, *infra* at pp. 3-4. Then the court held that this affirmative action plan was narrowly tailored to remedy the discrimination – a conclusion that cannot be seriously challenged by Vogel, whose sole injury is a delay of six months in his hire date to the police department.

Particularly in a complex decree that addresses both hiring and promotion issues, the use of hiring goals has been seen by some members of this Court to be preferable to techniques that burden the rights of incumbent employees. In *Wygant*, for example, the affirmative relief was applied during a layoff in derogation of seniority rights. The Court noted that the burden on innocent white workers was greater in that context than it is in the context of *hiring*. The Court in *Wygant* expressly approved of hiring goals:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job . . .
>
> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of

> achieving racial equality on particular individuals . . . [T]he Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes – *such as the adoption of hiring goals* – are available.

476 U.S. at 282 (plurality opinion) (emphasis added). See also *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (approving a 29% membership goal). The affirmative action plan contained in the decree negotiated by the federal government, the City of Cincinnati and the Fraternal Order of Police in this case is narrowly tailored to appropriately remedy the discrimination in this case.

In summary, none of the issues which petitioner asserts is appropriate for review by this Court. Moreover, none of the alleged divisions among the circuits actually exist. This case merely represents the application of settled principles of law to an individual claim of discrimination. There are no "special" or "important" reasons for granting certiorari in this case. See Supreme Court Rule 10.

III. CONCLUSION

The Petition for Writ of Certiorari should be denied. The decision of the Sixth Circuit Court of Appeals affirming the District Court was correct. Summary Judgment was properly granted by the District Court to Respondents, City of Cincinnati and Intervenor, and properly denied to Petitioner Richard Vogel.

Respectfully submitted,

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APPENDIX

CAROL CALLAHAN DEPOSITION

[p. 21] black and 23 percent were female?

A Correct.

Q Would that be true – how many classes have there been since this class? Any? This is the last class?

A There's a class right now.

Q Right. And the class that is going right now, are the percentages the same?

A No.

Q Why not?

A Because this is a goal for us. We could not meet our goal for the second class, so we went with the remaining individuals on the list.

Q Now, the class before that in 19___ whatever class came immediately before 89-01. Do you know the proportions in that?

A No, I really don't. I could look that up for you, but I'd hate to say it from memory.

Q Would it be correct to state that on the present class that the percentages are different because you simply ran out of the list?

A Right.

Q Of which? Females or black males, or white males?

A Of blacks.

* * *

[p. 28] sworn ranks of the CPD to 10 policewomen positions, required more education of female than male applicants for entry level positions with the CPD, did not provide promotional opportunities for women beyond the police specialist rank, and assigned women exclusively to the juvenile division of the CPD.

For the purpose of this deposition, we will concede that that would be a clear set of discriminatory criteria. Do you know of any criteria like that that applies to black individuals from that period or any time subsequent to that?

A No, I didn't know that either, it was before my time.

Q Are you familiar with something called the standard deviation test, the binomial approximation? Does that mean anything to you?

A No. Are you asking if I know what a stand [sic] deviation is, or you're talking about a specific test?

Q What I am doing is I am reading from an Affidavit of Vivian B. Toler. And she begins describing what she calls the binomial approximation (standard deviation test), which is calculated by taking the square root of the product, so forth. If you are familiar with that, I wanted to ask you some

* * *

[p. 30] created?

A Unless superseded by a consent decree, yes.

Q Okay, thank you.

MR. WYLER: Thank you. I have nothing further.

MR. GERHARDSTEIN: I have a couple of questions.

BY MR. GERHARDSTEIN:

Q Ms. Callahan, in respect to one of Mr. Wyler's questions, you said that exam number 89-01 was validated under the uniform guidelines; is that correct?

A Right.

Q Now, when you talk about validated, would you agree that your validation study applies to the exam and the questions that constitute the exam; is that correct?

A The whole selection process, the exam as well, yes.

Q When you get the results of the written exam, and you add your veteran's preference scores, do you rank people in the order of their exam result plus veteran's preference; right?

A Right.

[p. 31] Q And that ranking goes on to these eligible lists; isn't that correct?

A Correct.

Q Your validation study doesn't include any analysis of this ranking process, does it?

A No.

Q So that the test is valid as a pass-fail test, but not as a ranked test, is it?

MR. WYLER: Objection. Relevancy. Go ahead.

THE WITNESS: We believe that anyone who passes this test meets the minimum qualifications to go on with the process. It's just a very small part of a very large process.

BY MR. GERHARDSTEIN:

Q But for the purposes of the validation study one does under the uniform guideline, the person ranked number one is not more qualified than the person ranked number three, as per the uniform guidelines.

A I agree.

MR. GERHARDSTEIN: I have no further questions.

MR. WYLER: Nothing further.

* * *

CITY'S RESPONSES TO INTERROGATORIES

* * *

Civil Service law of the State of Ohio would be used in order to determine who would be placed in a recruit class.

RESPONSE: The City of Cincinnati did not notify its potential police recruit candidates in writing concerning any system it would use to determine who would be certified to the Police Chief for hiring. Defendant believes that Plaintiff knew the Consent Decree would be used as he participated in the selection process previously and his father is a Cincinnati Police Officer.

15. For white males, what score on examination 89-01 constituted a passing score showing minimal proficiency.

RESPONSE: A score of 60% constituted a passing score for all individuals including white males.

16. For black males, what score on examination 89-01 constituted a passing score showing minimal proficiency.

RESPONSE: A score of 60% constituted a passing score for all individuals including black males.

17. For females, what score on examination 89-01 constituted a passing score showing minimal proficiency.

RESPONSE: A score of 60% constituted a passing score for all individuals including females.

18. Has examination 89-01 been validated pursuant to guidelines of The Equal Employment Opportunity Commission, the Ohio Civil Rights Commission, or any other federal or state governmental agency?

RESPONSE: Yes.

19. Are the scores shown on eligible lists, for Civil Service examinations, intended to show the level of proficiency in the job tested for, without race-based or sex-based bias.

RESPONSE: Written test scores are based upon the number of exam questions answered correctly plus additional credits such as for veteran status. Such examinations are dictated by Ohio Civil Service law, scores are generated as a result of State law and intent must be derived from that law. Scores are one factor in the selection proces [sic] for police recruits.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICHARD VOGEL, Plaintiff, vs. CITY OF CINCINNATI, et al., Defendants.	:	CASE NO. C-1-89-683 (RUBIN, J.) DEFENDANTS' RESPONSE TO REQUEST FOR ADMISSIONS

Plaintiff hereby propounds pursuant to Ohio Rule 36(A) the following Requests for Admission. Each Defendant shall separately state to each Request whether it is "admitted" or "denied" or otherwise indicate his Answer in compliance with Ohio Civil Rule 36.

Each Admission shall be made in the space provided herein, in writing and under oath, within 28 days from the date of service hereof.

These Requests for Admissions are to be considered as continuing in nature so that if any information is discovered after the initial response, you are obligated to furnish to the Plaintiff.

REQUEST FOR ADMISSIONS

1. On October 9, 1989, the City of Cincinnati swore in a new police recruit class.

RESPONSE: Admitted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	:	CIVIL NO. C-1-80-369
Plaintiff,	:	
v.	:	
CITY OF CINCINNATI, OHIO et al.	:	
Defendant.	:	

JOINT STIPULATIONS AMONG THE UNITED STATES, THE CITY OF CINCINNATI, MEMBERS OF THE CINCINNATI CIVIL SERVICE COMMISSION, AND QUEEN CITY LODGE NO. 69, FRATERNAL ORDER OF POLICE

(Filed July 31, 1981)

All parties to the above styled action agree to the following stipulations for the purposes of this action only:

The parties, and all of them, stipulate to the facts contained in the Joint Stipulations of Fact Between the United States and the City of Cincinnati, filed June 25, 1981 (copy attached and incorporated by reference herein), with the exception of stipulation number 36, which is hereby modified as follows and agreed to among all parties:

36. Following the lay-off of sworn police personnel in 1976, and until early 1980, the City of Cincinnati filled

entry-level vacancies in the sworn ranks of the Cincinnati Police Division only by recalling officers from lay-off.

37. The parties, and all of them, hereby stipulate to the facts contained in the affidavit of Vivian B. Toler, served and filed on June 26, 1981. A copy of the affidavit is attached and incorporated by reference herein.

38. The parties, and all of them, hereby stipulate that all documents listed as exhibits by plaintiff United States and Exhibits F-A, F-B, F-C, F-D, F-E, F-G, and F-I of defendant Queen City Lodge No. 69, Fraternal Order of Police (hereinafter FOP), are admissible except as to relevancy and agree that copies may be rendered in place of the originals.

39. On March 3, 1980, the City Manager of Cincinnati Mr. Sylvester Murray, sent a written memorandum to the Mayor and members of City Counsel, setting forth the background of the then current labor negotiations with the FOP, the proposed settlement, items which were not to be included in the written contract, and some personal comments (FOP Exhibit F-E).

40. On March 3, 1980, the City Manager of the City of Cincinnati, Mr. Sylvester Murray, sent a directive to the Safety Director of the City of Cincinnati indicating that the Chief of Police was to maintain a civil service promotable position or positions at Police Specialist rate of pay and at the level existing on January 1, 1980, which level was 152. (FOP Exhibit F-G).

41. Subsequent to March 3, 1980, but prior to November of 1980, the membership of the FOP, meeting in special session, ratified the contract between the FOP

and the City, consisting of the provisions contained in the memorandum from the City Manager to City Council dated March 3, 1980, including provisions a-c under "Other Items Not Part of the Written Contract" on page 3 of the memorandum, (FOP Exhibit F-E).

42. Subsequent to March 3, 1980, but prior to November of 1980, the members of the Cincinnati City Council approved the actions of the City Manager which are set forth in the memorandum from the City Manager to City Council dated March 3, 1980, including provisions a-c under "Other Items Not Part of the Written Contract" on page 3 of the memorandum, (FOP Exhibit F-E).

43. Although prior to the enactment in 1979 of the Bowen Amendment, Section 124.90 of the Ohio Revised Code, the City filled vacancies pursuant to Sections 124.27 and 124.44, it invoked the Bowen Amendment for entry-level hiring in 1981 and filled positions in the Cincinnati Police Division out of rank order of score from three separate eligibility lists; one for white males, one for black males and one for females.

44. No vacancies have been filled in the ranks of Police Specialist or Police Sergeant on the Cincinnati Police Division since the enactment in 1979 of the Bowen Amendment, Section 124.90 of the Ohio Revised Code.

/s/ Nicholas J. Pantel
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/s/ Donald E. Hardin
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